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Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

—v.—

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF OWENS CORNING IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF OWENS CORNING IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Owens Corning is the largest solvent defendant remaining in the asbestos personal injury litigation. As of June 30, 1996, Owens Corning had received nearly 330,000 asbestos claims since the 1970s, of which almost 190,000 were filed in the last

five years. Overall, Owens Corning has resolved almost 177,000 claims (the overwhelming majority by settlement) with another 152,000 pending. Virtually all of these claims are based on exposure to an asbestos-containing high-temperature insulation product which Owens Corning stopped making in 1972.

By mid-1996, Owens Corning and its insurers had paid well over $1.9 billion in indemnity costs to resolve asbestos personal injury claims. The Company estimates that its total future cost for asbestos personal injury claims will be another $2.1 billion, of which amount less than 30% will be covered by insurance.

Of the enormous numbers of claims, however, only a small minority involve serious injuries. For instance, only a fraction of the claims involve malignancies such as mesothelioma or lung cancer; by far, the largest numbers of cases involve mild forms of non-malignant conditions which result in little or no functional illness or impairment. A large proportion of the more recently filed claims appears to be the product of mass x-ray screenings designed to detect pleural changes in the lungs of individuals who have been occupationally exposed to asbestos but who have not experienced any impairment of lung function or other symptoms of asbestos-related disease. Because of uncertainty concerning the ultimate disposition of these large numbers of nonimpaired cases, Owens Corning has told its shareholders that the total future cost of the asbestos litigation may exceed even the Company's $2.1 billion estimate.

The decision below has the potential to expand vastly the asbestos litigation beyond its already unprecedented scale. Although this case arose under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, this Court has emphasized that FELA generally reflects common law principles of negligence and causation. Not surprisingly, therefore, FELA decisions routinely are cited in cases decided under the common law, and FELA cases frequently help to shape the development of common law doctrines. By permitting claims for negligent infliction of emotional distress and the recovery of medical monitoring

damages based on asbestos exposure alone, the Second Circuit has embraced a rule that, if adopted generally, would threaten to overwhelm defendants such as Owens Corning while swamping the court system.

Owens Corning submits this brief in support of petitioner pursuant to Rule 37.3(a) of the Rules of this Court. Letters of consent are being filed together with this brief.

SUMMARY OF ARGUMENT

Ten years and at least 200,000 claims ago, the Court of Appeals for the Third Circuit observed that asbestos litigation had already become "an unparalleled situation in American tort law." *In re School Asbestos Litig.*, 789 F.2d 996, 1000 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). The large majority of cases filed to date involve individuals with little, if any, significant impairment as a result of their alleged asbestos-related conditions. The decision below threatens to expand vastly this unprecedented and complex litigation by permitting claims, based on asbestos exposure alone, for negligent infliction of emotional distress and medical monitoring without even the pretext of underlying physical injury. The rule announced by the Second Circuit would give millions of individuals who lack *any* asbestos-related physical condition, but who can claim levels of asbestos exposure at least as great as respondent's, the right to bring actions based on that exposure. Lawsuits by only a fraction of these individuals could devastate defendants and the courts and imperil the funds available to compensate those asbestos-exposed individuals who develop actual disease.

This outcome would be legally unjustified, as well as practically imprudent. As this Court noted in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994), it is just such "unpredictable and nearly infinite liability" for emotional distress claims that led to the development of common law restrictions on "the class of plaintiffs who may recover and the types of harm for which plaintiffs may recover." *Id.* at 2408. By ignoring these well-established limitations, the Second Circuit's decision

threatens to expand what is already the largest litigation American courts have ever faced into an essentially limitless number of inherently subjective claims for non-physical injury.

The decision below is equally misguided with respect to claims for medical monitoring for asbestos-exposed individuals. The overwhelming consensus of medical and scientific opinion is that such monitoring is simply not beneficial. Thus, in addition to swamping the courts and sapping the assets of asbestos defendants, the new medical monitoring right announced by the Second Circuit will do plaintiffs very little, if any, good.

ARGUMENT

I. BY PERMITTING CLAIMS BASED ON EXPOSURE ONLY, THE SECOND CIRCUIT HAS ADOPTED A RULE THAT THREATENS TO PRODUCE A VAST AND UNWARRANTED EXPANSION OF ASBESTOS LITIGATION

Owens Corning is the largest solvent defendant in the asbestos personal injury litigation, having received well over 300,000 asbestos clams. Owens Corning respectfully submits this brief as *amicus curiae* to share with the Court information concerning the scope and character of the present litigation and the potential impact on the courts and present litigants of a massive new wave of lawsuits, based on asbestos exposure alone, by plaintiffs who do not suffer any actual physical injury.

A. Magnitude and Character of the Current Asbestos Litigation

It has become a truism that the asbestos litigation is unprecedented, its like not to be encouraged cavalierly.[1] Hundreds of thousands of asbestos personal injury claims have been filed, with a majority of those claims still pending. Yet relatively few of even these current plaintiffs suffer any significant physical limitations, with the serious claims being far out numbered by pleural plaque and other non-malignancy cases.

In 1991, the Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by the Chief Justice, warned that the "problems confronting the courts of this nation" related to asbestos death and disease claims had "reached critical dimensions" and were "getting worse." REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 1-2 (1991) [hereinafter "JUDICIAL CONFERENCE REPORT"]. "What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively." *Id.* at 2.[2]

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1. In discussing the tobacco litigation, the Fifth Circuit recently observed that "[n]ot every mass tort is asbestos, and not every mass tort will result in the same judicial crises." *Castano v. American Tobacco Co.*, 84 F.3d 734, 747 (5th Cir. 1996). Significantly, the court added that even the asbestos litigation disaster might have been avoided by more "stringent" judicial "'gate keeping'" and the dismissal of "weak and frivolous claims." *Id.* at 747 n.24 (citing various authorities).

2. Similar observations have been made by a number of courts. *See, e.g., Racich v. Celotex Corp.*, 887 F.2d 393, 394 (2d Cir. 1989); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1335-36 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986); *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 525 (Fla. Dist. Ct. App. 1985), *rev. denied*, 492 So. 2d 1331 (1986).

Since the JUDICIAL CONFERENCE REPORT was issued, the asbestos litigation crisis has indeed gotten worse. Well over half of the 330,000 total claims received by Owens Corning throughout the quarter-century history of the asbestos litigation — nearly 190,000 — were received since 1991. Owens Corning is not alone in this regard. Staggering numbers of new asbestos claims continue to be filed against numerous other former manufacturers or distributors of asbestos-containing products as well. *See, e.g.*, MEALEY'S LITIG. REP.: ASBESTOS, Aug. 16, 1996, at 21-23 (describing numbers of asbestos claims disclosed in the annual reports of Owens Corning, Fibreboard Corporation, USG Corporation, Owens-Illinois Inc., W.R. Grace & Co., Pfizer Inc. and other defendants).

Only a relatively small minority of the current lawsuits involve serious injuries. In particular, just a fraction of the cases involve severe asbestosis or asbestos-related malignancies such as lung cancer or mesothelioma. Far greater numbers involve mild asbestosis or conditions such as pleural plaques or pleural thickening. These pleural changes involve a thickening or calcification of the pleural tissue surrounding the lung but are associated with little if any actual impairment. For instance, United States District Judge Charles Weiner, who oversees the federal asbestos multidistrict proceedings, noted recently that "[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions," but they "are prone to be lost in the shuffle with pleural and other non-malignancy cases." *In re Asbestos Prods. Liab. Litig. (No. VI)*, Civ. A. No. MDL 875, 1996 WL 539589, at *1 (E.D. Pa. Sept. 16, 1996); *see also In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) ("In virtually all pleural plaque and pleural thickening cases, plaintiffs continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring."); Peter H. Schuck, *The Worst Should Go First:*

Deferral Registries in Asbestos Litigation, 15 HARV. J.L. & PUB. POL'Y 541 (1992).[3]

Significantly, in the context of both the present litigation and the Second Circuit rule in this case, the current non-malignancy cases are diagnosed largely by such signs as "subjective declarations of shortness of breath, tiredness and general lassitude," rather than objectively observable clinical findings. *Hawaii Fed. Asbestos Cases*, 734 F. Supp. at 1566. The diagnostic tests available — *e.g.*, x-ray readings and pulmonary testing — can also be subjective in nature. "Even many forms of pulmonary analysis are not definitive in measuring impairment." *Id.* As such, these claims are inherently susceptible to diagnostic bias and even outright fraud. Recently, Owens Corning filed suit in the Eastern District of Louisiana charging various medical screening laboratories with fraud and RICO violations in connection with an alleged scheme to fake medical test results in order to substantiate asbestos claims. *See Owens Corning v. Pitts*, No. 96-2095 (E.D. La.); *see also Raymark Indus., Inc. v. Stemple*, 714 F. Supp. 460 (D. Kan. 1988) (earlier RICO action by asbestos manufacturing defendant against plaintiffs' attorneys and physicians); *Raymark Indus., Inc. v. Stemple*, No. 88-1014-K, 1990 U.S. Dist. LEXIS 6710 (D. Kan. May 30, 1990) (same).

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3. As Judge Jack Weinstein has pointed out, large numbers of claims by plaintiffs without serious injury are often generated as a result of mass, "assembly-line" medical screening programs:

> [Some attorneys] have filed all of their cases without regard to the extent of injury. In conjunction with unions they have arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaque.

In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 748 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *on rehearing*, 993 F.2d 7 (2d Cir. 1993).

Beyond the possibility of fraud, many courts and commentators have worried that these less serious cases inappropriately consume judicial and financial resources that might be applied to more serious cases. Without doubt, the huge numbers of such cases have contributed to the long delays that have marked the asbestos litigation. *See, e.g., Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 335 (E.D. Pa. 1994) ("The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease."), *vacated*, 83 F.3d 610 (3d Cir.), *cert. granted*, 117 S. Ct. 379 (1996). In order to cope with this problem, Judge Weiner has established procedures, applicable to the federal multidistrict proceedings, to "prioritize[] malignancies and other serious disease cases." *Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 539589, at *1. A number of other courts have established inactive or "suspense" dockets which defer handling of pleural plaque cases, subject to return to the general docket should the plaintiffs develop a more serious asbestos-related disease. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, Civ. A. No. 2 MDL 875, 1996 WL 239863, at *3 (E.D. Pa. May 2, 1996) (citing pleural registries in Illinois, Maryland, Connecticut, Arizona and Hawaii). These approaches are far from universal, however, and tens of thousands of pleural cases remain on the regular dockets of many jurisdictions.

Clearly, the costs associated with these huge numbers of lawsuits have been staggering. According to one estimate, the total costs to all asbestos defendants as of 1991 (*before* the large wave of recent lawsuits) approximated $7 billion, with the final figures then projected to reach $50 to $100 billion. Suzanne L. Oliver & Leslie Spencer, *Who Will the Monster Devour Next?*, FORBES, Feb. 18, 1991, at 75, 79. At least 17 such companies have sought bankruptcy protection due to this deluge of asbestos-related personal injury litigation. *See* Ronald L. Motley & Joseph F. Rice, *The* Carlough *Settlement -- Blueprint for a Sane Resolution to the Asbestos Problem*, MEALEY'S LITIG. REP.: ASBESTOS, July 2, 1993, at 24, 25 ("[S]eventeen (17) former asbestos defendants — representing one-half to three-quarters of the original liability share — have gone into bankruptcy.").

These bankrupt companies collectively constitute well over 50 percent of the historical liability in asbestos personal injury cases. *Id.; see also Findley*, 129 B.R. at 747. If possible, the consequences for individual plaintiffs and the court system itself have been even more alarming. Bloated court dockets have made long pre-trial delays increasingly "routine," while the continuing exhaustion of defendants' assets has raised a real prospect that "future claimants may lose altogether." JUDICIAL CONFERENCE REPORT, *supra*, at 3; *see also Findley*, 129 B.R. at 746-47, 750-51, 812 (describing backlog of asbestos personal injury cases).

Leaving aside the issues raised by the decision below, there is no clear end in sight to these claims. Use of asbestos-containing products continued in significant amounts until at least 1974, with some kinds of exposure (*e.g.*, building demolition and asbestos removal) continuing to the present day. With latency periods for asbestos-related illnesses ranging from 15 to 40 years, actual disease claims are likely to continue at peak levels for at least another twenty years. *See* Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1973-74 (1992).[4] Moreover, with few meaningful limitations on the ability to sue, it can also be expected that pleural plaque and other non-malignancy cases will continue to far outnumber the claims of plaintiffs with serious illness.

Unlike respondent here, however, even pleural plaque plaintiffs invariably assert the existence of some *present* asbestos-related physical condition, and they often claim at least some level of actual impairment. *See, e.g., Simmons v. Pacor, Inc.*,

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4. As was noted in the JUDICIAL CONFERENCE REPORT, "predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015." JUDICIAL CONFERENCE REPORT, *supra*, at 2. Some experts believe that the total number of deaths will reach a half million, with projections of total morbidity many times the mortality figure. *Findley*, 129 B.R. at 737 (citing I. SELIKOFF, DISABILITY COMPENSATION FOR ASBESTOS-ASSOCIATED DISEASE IN THE UNITED STATES (1981)).

674 A.2d 232, 236 (Pa. 1996) (plaintiffs "contend that the scarring of their lung tissue caused by occupational asbestos exposure, as evidenced by their chest x-rays, is sufficient to establish an ascertainable and physically objective injury"; pleural conditions asserted to be "medically significant diseases that will never improve, and may worsen"); *Georgine*, 157 F.R.D. at 272 (citing views of experts for objectors to class settlement claiming that "individuals with pleural changes alone can have functional impairment").

B. Approval of Exposure-Only Asbestos Claims Would Wreak Havoc on the Courts and Remaining Solvent Defendants

The present situation does not begin to compare to the potential scope of a litigation for claims of emotional distress, based on mere asbestos exposure, which would raise "the specter of unlimited and unpredictable liability." *Gottshall*, 114 S. Ct. at 2411. As the Court recognized in *Gottshall*, it was in order to prevent such unlimited liability that courts traditionally "placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable." *Id.* at 2405.

Indeed, the prospect of virtually boundless liability was recognized by the Third Circuit in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), in rejecting asbestos exposure claims under FELA absent any present physical injury:

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.

Id. at 942; *see also Amendola v. Kansas City S. Ry. Co.*, 699 F. Supp. 1401, 1407-11 (W.D. Mo. 1988) (suggesting that "floodgates" would open were the court to permit claims under FELA based on asbestos exposure without present physical injury); *Batko v. Ogilvie*, No. 85 C 7873, 1986 WL 5761 (N.D. Ill. May 9, 1986) (following *Schweitzer*).

Respondent is clearly aware of the potential impact of a rule permitting claims based on mere asbestos exposure. In opposing *certiorari*, respondent attempted to minimize this probability, arguing that the rule adopted by the Second Circuit would apply in only a tiny number of FELA cases in which there had been "massive, lengthy and tangible" asbestos exposure. Respondent's Brief in Opposition at 5 (quoting *Buckley v. Metro-North Commuter R.R.*, 79 F.3d 1337, 1345 (2d Cir. 1996)). This is no more than wishful thinking. Rather, there is no reason that the rule adopted by the Second Circuit, if approved by this Court, would be limited to the FELA context or to the facts of respondent's case.

1. The Impact of This Court's Ruling Will Extend Far Beyond FELA Cases

Respondent says the rule enunciated by the Second Circuit will be limited to plaintiffs with unusual exposure under FELA. But the vast majority of asbestos personal injury claims are brought not against FELA employers but rather against former manufacturers or distributors of asbestos-containing products in tort.[5] FELA does not exist in a vacuum. As the Court stressed in *Gottshall*, FELA was intended, with the exception of certain "explicit statutory alterations," 114 S. Ct. at 2404, to embody "'common-law concepts of negligence and

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5. In addition, there are a significant number of maritime asbestos actions brought against both shipowners and manufacturing defendants under the Jones Act. Because the Jones Act incorporates the operative provisions of FELA, *see* 46 U.S.C. app. § 688(a), any ruling in this case will immediately be applied to these maritime cases.

injury.'" *Id.* (quoting *Urie v. Thompson*, 337 U.S. 163, 182 (1949)). FELA asbestos decisions necessarily look towards tort litigation principles. Similarly, any ruling from this Court concerning the viability of a cause of action based on mere asbestos exposure under FELA will have enormous consequences for the reception of such claims under the common law. Indeed, in spite of the fact that medical monitoring claims have previously been rejected in asbestos litigation, since the Second Circuit decision in this case, Owens Corning and other asbestos manufacturing defendants have been named in a spate of purported "medical monitoring" class actions on behalf of completely healthy individuals who have allegedly been exposed to asbestos-containing products. *See, e.g., Damaris v. ACandS, Inc.*, No. 47-242 (18th Jud. Dist. La.); *Howard v. ACandS, Inc.*, No. 96-C-350 (Cir. Ct. Kanawha County, W. Va.); *Butler v. Owens-Corning Corp.*, No. 02721 (Ct. C.P. Phil. County, Pa.). Rightly or wrongly, affirmance of the Second Circuit's decision undoubtedly would be viewed as giving the green light for the filing of a huge number of similar lawsuits.[6]

2. The Facts of Respondent's Case Provide No Limiting Principle

Respondent relies heavily on the unusual extent and duration of Mr. Buckley's asbestos exposure for the time period in which it occurred (*i.e.* the mid-1980s). By that time, however, millions of Americans had already experienced similar levels of asbestos exposure. One commonly cited estimate for the population that has experienced significant occupational exposure to asbestos is 21 million individuals. *See, e.g., Jackson*, 750 F.2d at 1337 (citing I. SELIKOFF, DISABILITY COMPENSATION FOR ASBESTOS-ASSOCIATED DISEASE IN THE UNITED STATES (1981)).

6. The Third Circuit's *Schweitzer* decision rejecting such a cause of action has been cited in numerous common law cases considering similar claims. *See, e.g., Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 543 (Me. 1986); *Giffear v. Johns-Manville Corp.*, 429 Pa. Super. 327, 632 A.2d 880, 886 (Super. Ct. 1993), *aff'd sub nom. Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996); *Hawaii Fed. Asbestos Cases*, 734 F. Supp. at 1567 n.8.

Indeed, the ultimate figure may be higher. Over the years, asbestos was used in some "3000 different products," *Wyatt v. A-Best Prods. Co.*, 924 S.W.2d 98, 106 (Tenn. Ct. App. 1995), including "tooth brushes, ironing board covers, brake linings, roofing shingles, fireproofing and insulating material." *Id.; see also Findley*, 129 B.R. at 736 (surveying the "multitude of applications" of asbestos-containing products).

Respondent's contention that exposure to substantial levels of asbestos dust is relatively rare in the 1980s or 1990s simply misses the point. Because of the long latency period of asbestos-related conditions,[7] there are presently living many millions of individuals who experienced such exposure in the past who presumably would be able to assert claims *today* for emotional distress and medical monitoring under the rule adopted by the Second Circuit. If even a small fraction of these individuals were to seek recovery for emotional distress or medical monitoring — or have such recovery sought on their "behalf" via purported class actions — the effects on the court system and the remaining solvent defendants could be catastrophic. *See Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) ("There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants. . . . Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's [sic]

7. *See, e.g.*, Ad Hoc Committee of the Scientific Assembly on Environmental and Occupational Health, American Thoracic Society, *The Diagnosis of Non-Malignant Diseases Related to Asbestos*, 134 AM. REV. RESPIR. DIS. 363, 365 (1986) (adopted as the official statement of the American Thoracic Society in March 1986).

being remediless."), *aff'd*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).[8]

Indeed, respondent's own asbestos exposure, which was limited to three years, is far less significant than the exposure claimed by most plaintiffs — many of whom worked at jobs involving close contact with asbestos-containing products *over many decades*. *See, e.g., Racich*, 887 F.2d at 394 (plaintiff had been "exposed to asbestos products for almost his entire adult life, from 1923 to 1974"); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1081 (5th Cir. 1973) (plaintiff exposed to asbestos-containing products over a 33-year period), *cert. denied*, 419 U.S. 869 (1974).[9] In that regard, respondent's repeated use

8. Because of its wide use, and because asbestos is a naturally occurring substance, it would be unusual for an urban American *not* to have been exposed to asbestos fibers. According to the scientific literature, most urban dwellers' lungs contain hundreds of thousands or millions of asbestos fibers per gram of dry lung tissue. *See*, Andrew Churg, *Nonneoplastic Diseases Caused By Asbestos*, *in* PATHOLOGY OF OCCUPATIONAL LUNG DISEASE 213, 219, 224-29 (Andrew Churg & Francis H.Y. Green eds., 1988); J.C. Wagner et al., *Correlation Between Fibre Content of the Lung and Disease in East London Asbestos Factory Workers*, 45 BRIT. J. INDUS. MED. 305-08 (1988). Despite the Second Circuit's reference to Mr. Buckley's "massive exposure" to asbestos dust, it is difficult to see why the court's novel version of the "physical impact" test would not permit claims by any plaintiffs who can demonstrate that they have inhaled asbestos fibers. Of course, even if the scope of "exposure only" asbestos litigation could somehow be confined to workplace exposure cases, the pool of potential plaintiffs would be enormous.

9. *See also Carel v. Fibreboard Corp.*, No. 94-5222, 1996 U.S. App. LEXIS 136, at * 2 (10th Cir. Jan. 4, 1996) (worker exposed to asbestos for 33 years; worker's wife exposed to asbestos dust from his clothes for 27 years); *Barnes v. Keene Corp.*, 67 F.3d 626, 627 (7th Cir. 1995) (plaintiff's husband "exposed to numerous asbestos products in the work place during the 43 years of his working life"); *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 751 (1st Cir. 1992) (claimant (continued...)

of the term, "the Snowmen of Grand Central Terminal," merely underscores the similarity of his situation and those of millions of others who were exposed to asbestos. Since the asbestos personal injury litigation began, plaintiffs have described levels of asbestos dust in their workplaces in nearly identical terms. *See, e.g., Smith v. ACandS, Inc.*, 31 Cal. App. 4th 77, 86, 37 Cal. Rptr. 2d 457, 461 (Ct. App. 1994) (asbestos insulator testified that there was so much asbestos dust at plaintiff's work-site that "one looked 'like a snowman'"); *Owens-Illinois v. Armstrong*, 87 Md. App. 699, 722, 591 A.2d 544, 554-55 (1991) (asbestos dust "would fly like snowflakes"; dust "was on your arms, on your clothes, in your nose and your eyebrows and mustache"), *aff'd in part, rev'd in part*, 326 Md. 107, 604 A.2d 47, *cert. denied*, 506 U.S. 871 (1992); *Goss v. American Cyanamid Co.*, 278 N.J. Super. 227, 233, 650 A.2d 1001, 1003 (Super. Ct. App. Div. 1994) (asbestos insulator would be covered with white dust so that he "'looked like a snowman'"); *Owens-Corning Fiberglas Corp. v. Garrett*, 343 Md. 500, 510, 682 A.2d 1143, 1147 (1996) (asbestos dust "would make you look like a snowman").[10]

9. (...continued)
alleged exposure to asbestos at work from 1941 until 1985); *Neal v. Carey Canadian Mines, Ltd.* 548 F. Supp. 357, 365-66 (E.D. Pa. 1982) (claims of fifteen workers exposed to asbestos up to 36 years), *aff'd sub nom. Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985); *Simmons*, 543 Pa. at 667, 674 A.2d at 233 (plaintiff Simmons exposed to asbestos from 1943 through 1974); *Wilder v. Amatex Corp.*, 314 N.C. 550, 552, 336 S.E.2d 66, 68 (1985) (plaintiff exposed to asbestos for 41 years); *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 164, 421 N.E.2d 864, 865 (1981) (worker exposed to asbestos for 29 years).

10. *See also Peek v. SKW/Clinton*, 855 P.2d 415, 419 (Alaska 1993) (plaintiff's co-workers testified "that asbestos was 'like snow' in the air on several jobs"); *Lineaweaver v. Plant Insulation Co.*, 31 Cal. App. 4th 1409, 1420, 37 Cal. Rptr. 2d 902, 909 (Ct. App. 1995) (plaintiff exposed to friable asbestos that "created visible dust reminiscent of a 'snow storm'"); *United States Gypsum Co. v. Admiral Ins. Co.*, 268 Ill. App. 3d 598, 639, 643 N.E.2d 1226, 1252 (App. Ct. 1994) (so much asbestos "was released on (continued...)

Respondent and the Second Circuit also ignore the fact that, while asbestos use has dropped dramatically since the mid-1970s, people involved in building demolition or renovation work and asbestos removal may be similarly exposed today.[11] Whether it was prudent in 1985 to allow asbestos exposure such as that alleged by respondent is not at issue here. The question is whether the "injury" allegedly suffered suffices under FELA (or the common law) to state a cause of action.

There simply is no legally sufficient basis for so holding. Permitting claims based only on exposure and an allegation of emotional distress, especially as broadly construed by the Second Circuit, would be inconsistent with settled law. As this Court recognized in *Gottshall*, emotional distress claims are inherently subjective, and by their nature susceptible to being "imagined or falsified." *Gottshall*, 114 S. Ct. at 2405 (quoting *Maloney v. Conroy*, 208 Conn. 392, 397-98, 545 A.2d 1059, 1061 (1988)). There are "no necessary finite limits" on the number of persons who might claim emotional injury, and the "incidence and severity" of such claims is dependent upon a range of "psychological factors" that are often not objectively discernible. *Id.* It was in order to cabin the otherwise potentially boundless liability for emotional distress claims that courts imposed the

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10. (...continued)
a daily basis that it looked like it had been snowing indoors each day"), *app. denied*, 161 Ill. 2d 542, 649 N.E.2d 426 (1995); *ACandS, Inc. v. Asner*, 104 Md. App. 608, 654, 657 A.2d 379, 402 (1995) (insulators regularly "caused 'asbestos snow storms'" installing asbestos-containing products), *rev'd*, 1996 WL 583438 (Md. Oct. 11, 1996); *Dafler v. Raymark Indus., Inc.*, 259 N.J. Super. 17, 24, 611 A.2d 136, 140 (Super. Ct. App. Div. 1992) ("pipefitters' use of . . . asbestos products created dust to the extent that 'it seemed like a snowstorm'"), *aff'd*, 132 N.J. 96, 622 A.2d 1305 (1993).

11. *See* W. KEITH C. MORGAN & ANTHONY SEATON, OCCUPATIONAL LUNG DISEASES 315 (3d ed. 1995); W. RAYMOND PARKES, OCCUPATIONAL LUNG DISORDERS 416 (3d ed. 1994).

limitations on such claims that the Second Circuit has ignored in this case.[12]

By permitting recovery based only on an amorphous claim of some "emotional" distress, coupled with an equally undefined level of "physical" exposure, the Second Circuit has created an unworkable and ultimately meaningless test. In *Gottshall*, this Court expressly rejected such "highly subjective," "fact-specific" tests as providing no reliable limitations on emotional distress claims. 114 S. Ct. at 2409. In order to avoid the "unpredictable and nearly infinite liability" condemned in *Gottshall*, the Second Circuit's decision must be reversed.

II. THE DECISION BELOW IMPROPERLY CREATES A NEW MEDICAL MONITORING RIGHT FOR A VAST ASBESTOS-EXPOSED POPULATION DESPITE AN OVERWHELMING CONSENSUS THAT THERE IS NO BENEFIT FROM SUCH MONITORING

Perhaps more alarming than the Second Circuit's dramatic loosening of traditional common law requirements for emotional distress claims is the court's almost backhand

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12. These limitations, which are discussed at length by petitioner, include, in addition to the zone of danger test itself, that (i) the plaintiff's emotional distress must result in some physical manifestation, *see Plummer v. Abbott Labs.*, 568 F. Supp. 920, 926-27 (D.R.I. 1983) (citing "overwhelming weight of authority across the nation"); (ii) the plaintiff's emotional distress must be "severe," *see Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 566-67 n.13 (1987); and (iii) the plaintiff's emotional distress must be medically diagnosable and medically significant, *see Aurora v. Burlington N. R.R.*, 31 F.3d 724, 726 (8th Cir. 1994).

Here, it is undisputed that Mr. Buckley does not suffer any physical manifestation of his emotional distress and has never sought psychiatric treatment or seen a counselor. (J.A. at 519-20.) On the contrary, plaintiff's own expert testified that any concern displayed by Mr. Buckley did not rise to a level warranting counseling. (J.A. at 205-06.)

acceptance of a claim for "medical monitoring" which would seemingly be available to any one of the millions of Americans who can claim asbestos exposure similar to respondent's.

As if permitting such a claim were of no particular moment, the Second Circuit called it "hornbook law that a plaintiff may recover reasonable past and future medical expenses incurred as a result of an injury." *Buckley*, 79 F.3d at 1347 (citing CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 90 (1935)). However, it is precisely the requirement of any actual "injury" from which such expenses might result that the Second Circuit abandoned in this case.

It is true that a few courts have approved recovery for medical surveillance absent present injury. Even these courts, however, have typically done so in fairly limited situations involving the claims of a small group of people with the same exposure — not claims of individual exposure to widely disseminated substances in hundreds of thousands of disparate worksites. *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 832 (3d Cir. 1990) (38 persons who either worked in or lived adjacent to PCB-contaminated railroad yard), *cert. denied*, 499 U.S. 961 (1991); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 975, 863 P.2d 795, 801, 25 Cal. Rptr. 2d 550, 556 (1993) (four landowners living next to a toxic landfill); *Ayers v. Township of Jackson*, 106 N.J. 557, 565, 525 A.2d 287, 291 (1987) (339 residents whose well water was contaminated by toxic pollutants leaching into an aquifer).

The medical monitoring right announced by the Second Circuit has far broader ramifications. Were *Buckley* applied outside the FELA context, *see supra* Part I.B.1, it would establish a right to periodic medical screenings for many millions of individuals, all to be paid for by defendants in mass tort litigation which are struggling to pay claims by hundreds of thousands of plaintiffs who claim injury now.

In fact, several courts in the asbestos context have refused to permit exposed persons to recover for medical surveillance,

absent an existing asbestos-related physical condition. *See Theer v. Philip Carey Co.*, 133 N.J. 610, 627-28, 628 A.2d 724, 733 (1993); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984); *Fried v. Sungard Recovery Servs.*, 925 F. Supp. 375, 376-77 (E.D. Pa. 1996). Even the New Jersey Supreme Court, the same state court that approved a medical monitoring claim in *Ayers*, imposed the requirement of a present asbestos-related condition in response to the argument that to hold otherwise would "open the floodgates" to exposure-only litigants. *Theer*, 133 N.J. at 625, 628 A.2d at 732.

Strong policy grounds exist for exercising great caution before expanding recovery for medical monitoring in the context of asbestos exposure. Any time courts are called upon to make what are essentially medical care decisions, they venture into an area in which their competence is necessarily limited. *See, e.g., Glick v. Henderson*, 855 F.2d 536, 539 (8th Cir. 1988) (courts are "hardly suited" for the task of "dictat[ing] medical guidelines"); *Sosa v. Board of Managers*, 437 F.2d 173, 177 (5th Cir. 1971) ("Courts must not attempt to take on the escutcheon of Caduceus."). Here, the Second Circuit enters the managed care business by establishing a broad right to a form of medical treatment which is not accepted by the medical community.

As a matter of logic as well as law, a program of medical monitoring should not be pursued unless there is some significant chance that it will result in a medical *benefit*. *See Building & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1493 (10th Cir. 1993); *Abuan v. General Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994); *Ayers*, 106 N.J. at 606, 525 A.2d at 312. Here, routine monitoring for early signs of disease is not medically advisable for an asymptomatic, asbestos-exposed population.[13] Rather, the conclusion of such

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13. At trial, essentially the only proof offered in support of respondent's claim that medical monitoring was justified was the bare assertion of one of Mr. Buckley's treating physicians, Dr. Steven Markowitz, that he believed the screening would be beneficial. (J.A. at 92-94.) However, even Dr. (continued...)

authoritative bodies as the American College of Physicians, the United States Preventive Services Task Force, and the Canadian Task Force on Periodic Health Examinations is that screening of asymptomatic people is recommended only in narrow circumstances.[14] This conclusion has been reached following detailed studies designed to determine whether specific screening tests actually improve patient morbidity and mortality. While certain tests have survived that scrutiny (*e.g.*, mammography for women over fifty and sigmoidoscopy for men over fifty), other popular screening tests have not (*e.g.*, annual physical examinations and periodic chest x-rays).[15]

There is strong medical agreement that screening tests for the early detection of asbestos-related conditions is *not* warranted. With respect to non-malignant conditions, there is little that can be done to prevent the progression of disease that would not be medically recommended regardless of early detection, such as ceasing any ongoing exposure or discontinuing smoking.[16] Moreover, with respect to the rarest and most serious

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13. (...continued)
Markowitz admitted that any medical benefit of screening tests for asbestos-exposed individuals had not been demonstrated in the scientific literature. (J.A. at 164-65.)

14. *See* U.S. PREVENTIVE SERVICES TASK FORCE, GUIDE TO CLINICAL PREVENTIVE SERVICES (2d ed. 1996); Canadian Task Force on the Periodic Health Examination, *The Periodic Health Examination*, 121 CAN. MED. ASSOC. J. 1193 (1979). *See generally*, Robert S.A. Hayward et al., *Preventive Care Guidelines 1991*, 114 ANNALS INTERNAL MED. 758 (1991) (comparing the screening tests recommended by the American College of Physicians, the Canadian Task Force on the Periodic Health Examinations, the United States Preventive Services Task Force, and the American Cancer Society).

15. *See* Hayward, *supra*.

16. *See generally* EDWARD A. GAENSLER ET AL., RADIOGRAPHIC PROGRESSION OF ABSESTOSIS WITH AND WITHOUT CONTINUED EXPOSURE 386-92 (VIIth (continued...)

asbestos-related condition, a malignancy called mesotheolioma, early detection is unfortunately irrelevant because the illness is "invariably fatal." *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 660 n.2, 512 A.2d 466, 475 n.2 (1986).[17]

The inappropriateness of an undifferentiated right to medical monitoring for asbestos-related conditions may best be seen by looking at lung cancer, which can be asbestos-related. Lung cancer can sometimes be treated effectively, particularly by surgery. Because of the possibility of effective treatment, substantial scientific studies have been undertaken concerning the benefits of early screening tests such as periodic x-rays and sputum cultures. However, as a direct result of this research, a strong scientific consensus has emerged *against* such screening, even for high-risk groups.

Beginning in the 1950s, several studies of x-ray screening failed to show any significant benefit from lung cancer screening.[18] More recently, the National Cancer Institute sponsored three large, long-term randomized control trials of lung cancer screening, using both x-rays and cultures, conducted

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16. (...continued)
Int'l Pneumoconioses Conference Pub. No. 90-108, Sept. 1990).

17. *See also* Åke Sandén & Bengt Järvholm, *A Study of Possible Predictors of Mesothelioma in Shipyard Workers Exposed to Asbestos*, 33 J. OCCUPATIONAL MED. 770 (1991) (medical monitoring would be of little value identifying persons with a high risk of mesothelioma).

18. *See, e.g.*, Gary D. Friedman, *Effects of MHTS on Patients*, *in* MULTIPHASIC HEALTH TESTING SERVICES 538-45 (Morris F. Collen ed., 1978); Katharine R. Boucot & William Weiss, *Is Curable Lung Cancer Detected by Semiannual Screening?* 224 JAMA 1361 (1973); A. Lilienfeld et al., *An Evaluation of Radiologic and Cytologic Screening for the Early Detection of Lung Cancer: A Cooperative Pilot Study of the American Cancer Society and the Veterans Administration*, 26 CANCER RES. 2083 (1966).

by the Mayo Clinic,[19] Johns Hopkins University,[20] and Memorial Sloan-Kettering Hospital.[21] The results of these trials, and similar European studies conducted during approximately the same time period, have been analyzed and discussed in great detail in the scientific literature:

> Four recent controlled trials and one case-control study failed . . . to show that screening reduces lung cancer mortality even in high-risk persons (smokers). In the Mayo Lung Project, for example, the lung cancer death rate in high-risk men offered sputum cytology and chest roentgenogram every 4 months was 3.1 per 1000 person-years, compared with 3.0 per 1000 person-years in a control group. Chest roentgenograms and sputum cytology lead to false-positive test results in smokers of approximately 5% and 0.5%, respectively. *Because of the lack of evidence of benefit and because of its potential harms and costs, screening for lung cancer is not recommended.*

David M. Eddy, *Screening for Lung Cancer*, 111 ANNALS INTERNAL MED. 232, 232 (1989) (Introduction) (emphasis added).[22]

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19. Robert S. Fontana et al., *Lung Cancer Screening: The Mayo Program*, 28 J. OCCUPATIONAL MED. 746 (1986).

20. John K. Frost et al., *Early Lung Cancer Detection: Results of the Initial (Prevalence) Radiologic and Cytologic Screening in the Johns Hopkins Study*, 130 AM. REV. RESPIR. DIS. 549 (1984).

21. *Early Lung Cancer Detection: Summary and Conclusions*, 130 AM. REV. RESPIR. DIS. 565 (1984).

22. *See also* John C. Ruckdeschel, *Whither Screening for Lung Cancer?*, J. NAT'L CANCER INST. 78 (1988); D.R. Sanderson & J.R. Jett, *Lung Cancer: The American View*, 2 EURO. RESPIR. J. 1002 (1989).

The results of this research led to the abandonment of the American Cancer Society's recommendation for annual chest x-rays for asymptomatic individuals, even in high-risk groups such as smokers.[23] Similarly, the American Academy of Family Physicians, the American College of Radiology, the American Thoracic Society, the American College of Physicians, and the Canadian Task Force on Periodic Health Examination have *all* issued recommendations against routine screening of asymptomatic individuals for lung cancer.[24]

The same position has been taken by the United States Preventive Services Task Force in its GUIDE TO CLINICAL PREVENTIVE SERVICES. In publishing the GUIDE, the Task Force coordinates the input of a large variety of governmental agencies in the health care area, including the Centers for Disease Control and Prevention, the Public Health Service, the Food and Drug Administration, and the National Institutes of Health, as well as a large number of private health care organizations and agencies. As such, the GUIDE probably comes as close to expressing a consensus view regarding preventive services as any one publication could. *See* Lee Radford, *Medical Monitoring Claims: A Review of the Guide to Clinical Preventive Services*, TOXICS L. REP., Apr. 10, 1996, at 1302. Citing the published scientific literature, as well as the unanimous view of medical and scientific organizations, the GUIDE flatly recommends against periodic lung cancer screening. *See* GUIDE TO CLINICAL PREVENTIVE SERVICES, *supra*, at 135-39.[25]

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23. Ruckdeschel, *supra*, at 78.

24. *See* GUIDE TO CLINICAL PREVENTIVE SERVICES, *supra*, at 137 & nn. 26-31; AMERICAN ACADEMY OF FAMILY PHYSICIANS, SUMMARY OF POLICY RECOMMENDATIONS FOR PERIODIC HEALTH EXAMINATIONS 14 (1996).

25. Notably, the GUIDE does recognize the benefits of early detection of colorectal cancer, another malignancy that is sometimes claimed to be caused by asbestos exposure. However, the GUIDE recommends annual fecal occult blood tests and/or sigmoidoscopy for *all* men over fifty years

(continued...)

In light of this widespread agreement in the medical and scientific communities that medical monitoring for asbestos-exposed individuals is not beneficial, the Second Circuit's creation of a legal right to sue for the costs of such monitoring is particularly troubling. Even apart from the impact on an already problematic litigation, the science shows that recovery would do plaintiffs little if any good. Clearly, before the courts of this country embark on the kind of massive exercise in redistribution of funds entailed by litigation-financed screening tests for millions of individuals, some more solid basis in science and medicine would seem to be required.[26]

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25. (...continued)
of age to detect colorectal cancers. Guide to Clinical Preventive Services, *supra*, at 89-103. No additional testing for such malignancies is prescribed based on a history of asbestos exposure. Because any asbestos plaintiff over the age of fifty should in any event undergo annual screening tests for colorectal cancer, even the Second Circuit's decision would not permit the recovery of the costs associated with these tests. *See Buckley*, 79 F.3d at 1347 (recovery limited to "a monitoring regime different than the one that would have been prescribed in the absence of [asbestos] exposure").

26. Moreover, permitting recovery for the future costs of periodic screening tests does not guarantee that the tests will actually occur. At present, workers and retirees in many asbestos-exposed occupations already have access to periodic screening tests under insurance or union health plans. The fact that only relatively few individuals take advantage of such testing now suggests that many others have simply decided that whatever benefits exist do not outweigh the inconvenience, discomfort and even risk involved in such tests. *Cf.* George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 255-56 (1993).

CONCLUSION

For the reasons stated, the decision below should be reversed.

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